APPEAL NO. 042270
FILED NOVEMBER 2, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 18, 2004. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on February 1, 2002, with a 17% impairment rating (IR), and that the claimant had disability during the period beginning on December 22, 2000, and continuing through July 30, 2003. The appellant (carrier) appealed the hearing officer's IR and disability determinations asserting legal error. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and remanded in part.

It is undisputed that the claimant sustained a compensable injury on _____; that the Texas Workers' Compensation Commission (Commission)-selected designated doctor is Dr. M; and that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides third edition) was the correct edition to be used in this case. The benefit review conference report reflects that the parties agree that the claimant reached statutory MMI on February 1, 2002. At issue was the claimant's IR rating. The carrier contended that the designated doctor improperly considered the claimant's post-MMI surgery in rating her IR.

Section 408.125(e) provides in part that for a compensable injury that occurred before June 17, 2001, the report of the designated doctor chosen by the Commission shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to the Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. Rule 130.1(c)(3), which became effective March 14, 2004, provides that "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination."

The evidence reflects that the claimant underwent spinal surgery, a two-level laminectomy and joint fusion at L4-5 and L5-S1, on January 30, 2003. The designated doctor examined the claimant on December 9, 2003, and he certified that the claimant reached MMI on February 1, 2002, with a 20% IR. Dr. M referenced Commission Advisory 2003-10, signed July 25, 2003, and determined that the claimant qualified for a 20% lumbar impairment under Diagnosis-Related Estimate (DRE) Lumbosacral Category IV because she had "a two level spinal fusion with nerve root exploration." It is undisputed that the designated doctor used the wrong edition of the AMA Guides and

that he amended his report using the correct edition of the AMA Guides. In a letter of clarification dated May 27, 2004, the designated doctor amended his report and assigned a 17% IR. Dr. M based his 17% IR on a 13% lumbar spine impairment under Table 49 (IV)(C) (multiple levels operated, with residual symptoms) and 4% impairment for loss of motion in the lumbar spine, for a combined value of 17% IR.[1] In reviewing Dr. M's report, we note that the 17% IR considers an impairment from the claimant's spinal surgery that occurred after the date of MMI and violates Rule 130.1(c)(3) as it has been interpreted.

The hearing officer erred in determining that Dr. M's amended certification of the claimant's IR is entitled to presumptive weight. The hearing officer commented in the Background Information section of the decision and order that the claimant had already undergone spinal surgery before the date of the examination and that the "inclusion of impairment based upon the spinal surgery of January 30, 2003, was consistent with the proper application of the third edition of the AMA Guides. . . ." The hearing officer cites Texas Workers' Compensation Appeal No. 032366, dated decided October 29, 2003, in which the Appeals Panel held that "the fact that the spinal surgeries occurred after statutory MMI does not automatically mean that they cannot ever be considered in determining IR." However, in Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, the Appeals Panel referred to the preamble to Rule 130.1(c)(3) in noting that if the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a reevaluation of the IR as of the new MMI date. Rule 130.1(c)(3) has been interpreted to mean that the IR shall be based on the condition as of the MMI date and not based on subsequent changes, including surgery. *See also* Texas Workers' Compensation Commission Appeal No. 040583, decided May 3, 2004. Additionally, Rule 130.1(c)(3) does not contain any exceptions for cases where the carrier denies or delays diagnostic testing.

In view of the evidence presented, the hearing officer erred in determining that the findings of Dr. M's amended certification of the claimant IR are entitled to presumptive weight. We reverse the hearing officer's determination that the claimant's IR is 17% because very clearly Dr. M considered, and included in his evaluation, the claimant's post-MMI surgery. We remand for the claimant to be evaluated and rated by the designated doctor for an IR of the compensable injury based on the claimant's condition as of the MMI date of February 1, 2002.

We have reviewed the complained-of disability determination. Whether the claimant had disability presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The hearing officer could believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Nothing in our review of the record reveals that the challenged determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust.

[1] We note that the Combined Values Chart, page 247, AMA Guides, reflects that a 13% impairment and a 4% impairment, combine to a whole person value of 16%, rather than 17%.

Accordingly, no sound basis exists for us to disturb those determinations on appeal. Although another fact finder may have drawn different inferences from the evidence, which would have supported a different result, that fact does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

We affirm the hearing officer's disability determination. We reverse the hearing officer's determination that the claimant's IR is 17% and we remand for the claimant to be evaluated and rated by the designated doctor for an IR of the compensable injury based on the claimant's condition as of the MMI date of February 1, 2002.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **TEXAS HOSPITAL INSURANCE EXCHANGE** and the name and address of its registered agent for service of process is

ROBERT LAWRENCE DION
6300 LA CALMA, SUITE 550
AUSTIN, TEXAS 78761.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

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Gary L. Kilgore
Appeals Judge